85-912

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM E. BROCK, SECRETARY OF LABOR,
PETITIONER

v.

SOUTHEASTERN ARIZONA GOVERNMENTS ORGANIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Section 106(b) of the Comprehensive Employment and Training Act (CETA), 29 U.S.C. (Supp. V 1981) 816(b), which states that the Secretary of Labor "shall" issue a final determination within 120 days of the receipt of a complaint alleging the unlawful use of CETA funds by a grant recipient, bars the Secretary from recovering misused grant funds when he fails to issue a final determination within the 120-day period.

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In the Supreme Court of the United States

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No.

WILLIAM E. BROCK, SECRETARY OF LABOR,
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v.

SOUTHEASTERN ARIZONA GOVERNMENTS ORGANIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of William E. Brock, Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra,* 1a-2a) is unreported. The decision of the administrative law judge (App., *infra,* 3a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 11a) was entered on May 20, 1985, and a petition for rehearing was denied on August 28, 1985 (App., *infra,* 12a). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 106(b) of the Comprehensive Employment and Training Act, 29 U.S.C. (Supp. V 1981) 816(b), provides in pertinent part:

> Whenever the Secretary receives a complaint from any interested person or organization * * * which alleges, or whenever the Secretary has reason to believe (because of an audit, report, on-site review, or otherwise) that a recipient of financial assistance under this chapter is failing to comply with the requirements of this chapter, the regulations under this chapter or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter. The Secretary shall conduct such investigation, and make the final determination required by the following sentence regarding the truth of the allegation or belief involved, not later than 120 days after receiving the complaint. If, after such investigation, the Secretary determines that there is substantial evidence to support such allegation or belief that such a recipient is failing to comply with such requirements, the Secretary shall, after due notice and opportunity for a hearing to such recipient, determine whether such allegation or belief is true.

STATEMENT

1. The Comprehensive Employment and Training Act (CETA), 29 U.S.C. (Supp. V 1981) 801 *et seq.*, authorized the Secretary of Labor to grant federal funds to qualified entities, principally states or local government units, for programs "provid[ing] job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons." 29 U.S.C. (Supp. V 1981) 801; see also S. Rep. 95-891, 95th Cong., 2d Sess. 4, 42-43 (1978);

H.R. Rep. 93-659, 93d Cong., 1st Sess. 1-3 (1973).[1] The statutory scheme was carefully constructed to ensure that programs financed with CETA funds would further the purposes of the Act. Thus, the statute prescribes detailed eligibility standards for participants in CETA programs and sets forth the terms and conditions governing the employment of such program participants. See 29 U.S.C. (Supp. V 1981) 823-827; see also 20 C.F.R. 675.5, 676.21 to 676.30a, 676.51 to 676.76. Each grant recipient is required to submit assurances that its program will comply with all applicable statutory and regulatory requirements (29 U.S.C. (Supp. V 1981) 813(a)(21)).

The Act authorizes the Secretary of Labor to conduct audits of CETA grant recipients "[i]n order to assure that funds provided under [the CETA] are used in accordance with its provisions" (29 U.S.C. (Supp. V 1981) 835(a)).[2] In

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[1]The statute originally was enacted in 1973 (Pub. L. No. 93-203, 87 Stat. 839 *et seq.*) and was amended substantially in 1978 (Pub. L. No. 95-524, 92 Stat. 1909 *et seq.*). The CETA was repealed effective October 13, 1982, and replaced by the Job Training Partnership Act, 29 U.S.C. 1501 *et seq.* (see Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357). However, the CETA continues to govern administrative or judicial proceedings pending on October 13, 1982, or begun between October 13, 1982, and September 30, 1984 (29 U.S.C. 1591(e)).

[2]Typically, an audit is performed or arranged by the Department of Labor's Office of Inspector General and the audit report is forwarded to the Department of Labor grant officer responsible for the particular grant. The grant officer provides the grant recipient with an opportunity to comment on the report, issues an initial determination, offers to attempt informally to resolve the dispute, and then issues a final determination. 20 C.F.R. 676.86(d), 676.88. The grant recipient is entitled to a hearing before an administrative law judge (ALJ) with respect to the grant officer's final determination. The ALJ then renders a decision that, if not modified or vacated within 30 days, becomes the final decision of the Secretary. A decision adverse to the grant recipient or another interested person is subject to judicial review in a court of appeals. 29 U.S.C. (Supp. V 1981) 816(b), 817(a); 20 C.F.R. 676.88 to 676.92.

addition, any interested person, such as a program participant, may file a complaint with the Secretary alleging that a grant recipient has failed to comply with CETA standards (29 U.S.C. (Supp. V 1981) 816)).

Section 106(b) of the Act, 29 U.S.C. (Supp. V 1981) 816(b), states that if the Secretary obtains information—either as the result of an audit or through the receipt of a complaint—concerning a grant recipient's failure to adhere to the Act's requirements, the Secretary must investigate the matter. The same provision then states that "not later than 120 days after receiving the complaint," the Secretary "shall" make a "final determination" regarding the allegation involved (*ibid.*). If after notice to the grant recipient and an opportunity for a hearing, the Secretary finds that the grant recipient violated the CETA's requirements, the Secretary may order the grant recipient to repay any misspent funds to the United States. 29 U.S.C. (Supp. V 1981) 816(b) and (d).

2. Respondent, an association of local governments in Arizona, received a CETA subgrant in 1980 from the Department of Economic Security of the State of Arizona. The Department of Economic Security (DES) received the CETA funds from the federal government. On August 22, 1981, a private accounting firm filed with the DES an audit report concerning respondent's subgrant; the audit report was received by the Labor Department grant officer who administered the DES grant on or before October 5, 1981. App., *infra,* 4a-5a. The grant officer issued a final determination 184 days later, on April 7, 1982, disallowing $2,461 in costs claimed by respondent on the ground that the costs related to the hiring of an ineligible CETA participant (*id.* at 4a-5a).

The DES sought review of the grant officer's determination before an administrative law judge (ALJ).[3] The ALJ found that respondent had incurred the costs in violation of CETA regulations and ordered the DES to repay the $2,461 to the United States (App., *infra,* 3a-10a). The DES argued that the length of time between the grant officer's receipt of the audit report and his issuance of the final determination barred the repayment order. The ALJ rejected this claim, holding that Section 106(b) and the implementing regulations were "essentially made for internal order and not intended to deprive the Department of its rights" (App., *infra,* 9a). The ALJ's decision became the final decision of the Secretary (see 20 C.F.R. 676.91(f)), and respondent sought judicial review in the court of appeals pursuant to 29 U.S.C. (Supp. V 1981) 817.

3. The court of appeals summarily reversed the Secretary's determination (App., *infra,* 1a-2a).[4] The court observed that "[t]he Secretary failed to make a final determination within 120 days of receiving a final audit report," and held that the 120-day limit set forth in Section 106(b) is "mandatory and jurisdictional" (App., *infra,* 2a). The court cited its prior decision in *City of Edmonds* v. *Department of Labor,* 749 F.2d 1419 (9th Cir. 1984), in which the court stated that "Congress intended to preclude any action on a complaint if the Secretary failed to make a final determination within 120 days" (749 F.2d at 1422).

REASONS FOR GRANTING THE PETITION

The question presented in this case is the same as the question now before the Court in *Brock* v. *Pierce County,*

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[3]Respondent did not appear in the administrative proceeding (App., *infra,* 3a).

[4]The court of appeals denied the Secretary of Labor's motion to dismiss the petition for review, holding that respondent had standing to seek review of the Secretary's order (App., *infra,* 1a).

cert. granted, No. 85-385 (Nov. 4, 1985); *i.e.*, whether Section 106(b) of the CETA bars the Secretary of Labor from recovering misspent CETA funds when he fails to issue a final determination within 120 days.[5] Here, as in *Pierce County*, the court of appeals reversed a determination of the Secretary of Labor directing the repayment to the United States of misspent CETA funds because the court viewed Section 106(b) as establishing a jurisdictional bar to the recovery of those funds. We demonstrated in our petition in *Pierce County* (at 8-16) that this interpretation of Section 106(b) is incorrect because it ignores a well-settled rule of statutory construction and is contrary to the explicit legislative history and purposes of the CETA.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of *Brock* v. *Pierce County*, No. 85-385.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FRANCIS X. LILLY
Solicitor of Labor
Department of Labor

NOVEMBER 1985

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[5]We have served respondent with a copy of our petition for a writ of certiorari in *Brock* v. *Pierce County*.

DOJ-1985-11

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEASTERN ARIZONA GOVERNMENTS ORGANIZATION,	)	Nos. 85-7042 85-7043
Petitioner,	)	
vs.	)	
U.S. DEPARTMENT [OF] LABOR,	)	ORDER
Respondent.	)	

FILED: MAY 20, 1985

Before: KENNEDY, ALARCON and FERGUSON, Circuit Judges

Petitioner's motion for leave to file a late opposition is granted.

Respondent's motion to dismiss the petition for review in 85-7042 is denied. As a CETA recipient, petitioner Southeastern Arizona Governments Organization has standing to seek review of the Secretary's final order. 29 U.S.C. §§ 817(a), 802(23). By meeting the statutory standing requirement, petitioner has necessarily met the article III standing requirement. *Preston v. Heckler*, 734 F.2d 1359, 1364 (9th Cir. 1984).

Petitioner's motion for summary reversal in 85-7042 is granted. The Secretary failed to make a final determination within 120 days of receiving a final audit report. The 120-day limit is mandatory and jurisdictional. 29 U.S.C. § 816(b); *City of Edmonds v. Department of Labor*, 749 F.2d 1419, 1422 (9th Cir. 1984).

The motions for leave to intervene or to substitute parties in 85-7042 are denied as moot.

The petition for review in 85-7043 shall proceed independently. Petitioner shall file its opening brief within 42 days of the entry of this order. Subsequent briefs shall be filed in accordance with Fed. R. App. P. 31(a).

APPENDIX B

U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
SOUTHEASTERN ARIZONA GOVERNMENTS ORGANIZATION	:	Case No. 82-CTA-227

DECISION AND ORDER

This is a proceeding brought under the Comprehensive Employment and Training Act of 1973, as amended (29 USC 801 *et seq.*, hereinafter referred to as the "Act"), and the regulations issued by the United States Department of Labor (hereinafter referred to as the "Department") as the result of the final determination of the Department's grant officer disallowing costs, totalling $499,200.00, incurred by the prime sponsor Department of Economic Security of the State of Arizona (hereinafter referred to as "DES"), and its subgrantees or contractors among whom was the Southeastern Arizona Government Organization (hereinafter referred to as "SEAGO") which lend its name to this proceeding. The grant officer's decision was directed, however, to DES and it was DES which appeared herein as the party having requested a hearing. SEAGO did not appear in this proceeding. DES is the true party having requested a hearing herein and responsible for paying disallowed amounts, if any, to the Department out of non-CETA funds.

At the opening of the hearing held herein and at which the parties presented documentary and DES also testimonial evidence counsel stated that the parties had resolved all disputes herein except the disallowance of costs in Finding No. 7, involving payments of compensation to the allegedly ineligible participant H. under a SEAGO Title II-D health project. The amounts paid to this participant totalled $2,461.00. The evidence presented at the hearing was limited to this item which the parties thereafter briefed.

FINDINGS OF FACT

1. *The Grant, Audit, and Final Determination*

During the fiscal year 1980 SEAGO was a subgrantee of DES under a Title II-D subgrant for $1,032,184 (AF, Tab L). In the summer of 1981 DES caused its numerous subgrants to SEAGO to be audited by a private accounting firm in Phoenix, AZ. The accountants audited altogether 15 subgrants awarded between 1 October 1978 and 1 October 1979. In all instances the grant covered either FY'79 or FY'80 and was audited for that year.

The cost-questioning finding in issue is Finding 7, involving the enrollment of H. as a participant in SEAGO's Title II-D program in the summer of 1980 (AF Tab L, p. 8). The auditors found that H's application had not been updated within 45 days of its date although H did not receive CETA employment within that time and did receive such employment 52 days after the date of his original application without the update required under 20 CFR 675.5-1(d). Hence, the auditors concluded that the wages paid to H, totalling $2,461, were paid to him without having met the requirements for participants in all CETA programs (see 20 CFR 675.5-1(a)) AF Tab L, p. 31.

The audit report, referred to above, was forwarded to the prime sponsor DES by its author on 22 August 1981. A copy thereof also reached the Department's Regional Audit Manager who transmitted a copy thereof to the Department's ETA Regional Administrator on 22 September 1981 (AF Tab L).

When the audit of the SEAGO subgrants reached the grant officer is not disclosed by the record but it was in his hands on 5 October 1981 when he transmitted the subgrant audit report to DES with the request for the prime sponsor's findings and determination within 60 days from date of receipt of the letter (AF Tab K).

The prime sponsor DES replied on 30 October 1981 that he would follow the auditor's recommendation on Finding 7 (*id.*, Tab J) and the grant officer's initial decision followed suit (*id.*, Tab I), citing violation of 20 CFR 675.5. In response thereto (*id.*, Tab H) DES stated that it wanted to change its position and now considered the participant compensation paid to H allowable. It explained in a subsequent letter of 21 January 1982 that it considered the materiality of the costs involved in Finding 7 and the percentage of error which it represented negligible compared to the overall operation and was, therefore, allowing the questioned costs (*id.*, Tab F). On 2 April 1982 DES stated again that as to Finding 7 the forgiveness criteria of 20 CFR 676.88(c) had been met (*id.*, Tab C).

On 7 April 1982 the grant officer issued his final determination stating that he could not allow the Finding 7 costs since all conditions of the cited regulation had not been met (*id.*, Tab B, p. 2).

Assuming that the subgrant audit reached the grant officer on 5 October 1981, his final determination followed 184 days later.

2. *The Eligibility of Participant H*

H applied for a CETA on 27 June 1980 and was found qualified. He had not worked for 15 out of the last 20 weeks and clearly was unemployed and economically disadvantaged (DES Ex. 1). According to the intake form only his roommate had income and, it may be inferred, supported him in whole or in part. H was employed on a behavioral health project on 18 August 1980, 52 days after intake and referral to his future CETA employer (as to the referral see DES Ex. 2, Part IV; as to start of employment see DES Ex., IV F).

H was enrolled 52 days after date of application but there is no record that his CETA intake application was updated. The cognizant SEAGO CETA supervisor testified that the intake form (DES EX. 1) did not show any updating (Tll). An inspection of the document leads to the same conclusion. The only possible subsequent entry shown on the intake form is under "Comment" at the lower right and reads" "Term 4-10-81". Whatever it may mean and in what circumstances it may have been made it does not bespeak updating of the application prior to the date when H became employed.

The same is true of an entry on the Service Record portion of H's general employment application form ES 511 (as to the general purpose of his form see Tll-12). This form shows the referral to the behavioral health project on 27 June 1980 and an entry on 23 July 80 with the letters "LOC" (DES Ex. 2, Part IV). This abbreviation means "local office contact" (Tl4) but the abbreviation does not permit of any inference as to the nature of the contact. The next entries show a change in H's food stamp allocation on 20 August 1980, two days after he was hired as a CETA participant (Tl5) and an entry that he obtained the CETA behavioral project position, made on 27 August 1980 by on the clerks in the Bisbee, AZ, office (T24).

The personnel records pertaining to H (DES Ex. 1 and 2) do, therefore, not show that his application was updated, that is reviewed and brought up to the present between 27 June and 18 August 1980. They do not show whether during this period H was employed, either in a full-time job which he abandoned when the CETA job became available or in a short-term or casual labor position. The proper way to sum up the record is to state that it is silent as to what H did in the 52 day period from 27 June to 18 August 1980 and that in consequence we do not know. On the basis of the record, however, it is clear that there was no update of H's application until 18 August 1980 when commencement of his CETA employment was noted on the intake form (DES Ex. 1) and it is so found. Subsidiarily it is found that the "LOC" entry of 23 July 1980 on H's form ES 511 (DES Ex. 2) does not show an updating either of that or of the CETA intake form.

CONCLUSIONS OF LAW

I

The applicable regulations require at 20 CFR 675.5-1(d) that an eligible applicant may be hired within 45 days of his application without an updating of his application, provided they did not obtain full-time permanent unsubsidized employment in the interim. It follows that an applicant who either before or after the 45-day period obtains such employment may not abandon it in favor of a CETA job. It further follows that an applicant who was not hired within 45 days after application needs to have his application updated to determine that he is still eligible for CETA employment, in this case for a title II-D program (see 20 CFR 675.5-5).

The hire of H as a CETA participant in the circumstances of this case disregarded the updating requirement and thus was, as the grant officer had determined, in violation of

20 CFR 675.5-1. As of the moment of hire on 18 August 1980 no one asked or found out whether H was still eligible and properly employable as a participant in CETA programs. It was the paramount purpose of the "update" provision to enable CETA employers to make this determination and avoid improper hires. Whether H was likely to have become ineligible during the 52-day period is immaterial. The requirement was to recheck at no more than 45-day intervals.

Since DES' subgrantee SEAGO hired H without reascertaining his eligibility, H's employment violated the regulations by which DES and SEAGO had agreed to abide. Hence, payment of compensation to H out of CETA funds was improper and was correctly disallowed.

A similar situation arose in *Pierce County, Washington,* 80-BCA/CTA-24 (1981), affirmed in relevant part, 699 F2d 1001 (9th Cir., 1983). There employees discharged by the County were rehired within less than the 15-day period of unemployment which the applicable regulations required. Hence, no determination of eligibility after the end of the 15-day period and before CETA employment was made in a substantial number of instances. In consequence, the disallowance of compensation paid these employees out of CETA funds was upheld by the presiding administrative law judge and affirmed by the United States Court of Appeals for the Ninth Circuit. The same result, as already stated, is reached here.

II

DES also has taken exception to the grant officer's refusal to remit the disallowance in application of 20 CFR 688(c). The section requires in subparagraph (c)(2) that "immediate action was taken to remove the participant." No such action was taken for H left his CETA job before the

impropriety of his employment as a participant was discovered. Hence, the condition of subparagraph (c)(2) was not met. The record is bereft of evidence that SEAGO properly followed or monitored eligibility determination procedures and required management systems (subpar. (c)(3)) or took any effective or, indeed, any action to remedy the problem revealed by the circumstances of H's employment (subpar. (c)(4)).

Hence, as the grant officer correctly observed, all conditions required for the application of 20 CFR 688(c) and the foregiveness of improper PSE expenditures are not present. The grant officer was thus correct in refusing to allow the challenged expenditure on the basis of that provision.

III

DES in its counsel's brief has reiterated certain arguments, presented in *Arizona Department of Employment Security,* 82-CTA-208 (1984), and rejected there. Thus DES again asserts that the Department lacks authority to issue determination regarding subrecipient audits (DES br., pp. 5-8), that the regulatory standard was met (DES Br., pp. 8-11), and that the Department is without authority to maintain the sanction imposed against DES (DES Br., pp. 14-17). These matters were fully discussed in the cited case and need not be again considered here.

DES also again cites the 120-day rule for issuance of a final determination by the grant officer (29 USC 816; 20 CFR 676.86 (a)(1). Here, the 120-day period was exceeded by 64 day. But it does not follow that the Department thereby loses its rights against the prime sponsor. The provisions of the Act and the regulation issued thereunder are essentially made for internal order and not intended to deprive the Department of its rights. Other means exist to

enforce the rule as was pointed out in *American Indian Community House,* 81-CTA-199 (1984). To the extent that *Lehigh Valley Manpower Program* v. *Donovan,* F2d (3d Cir. 1983) holds otherwise, it need not be, and I respectfully decline for the reasons previously stated, to follow it.

IV

Accordingly, on the Findings of Fact and Conclusions of Law the Arizona Department of Employment Security is ordered to pay out of non-CETA funds $2,461 to the U.S. Department of Labor.

Dated: Washington, DC
22 October 1984

/s/ Rudolf Sobernheim

RUDOLF SOBERNHEIM
Administrative Law Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEASTERN ARIZONA GOVERNMENTS ORGANIZATION,	
Petitioner,	
vs.	
U.S. DEPARTMENT OF LABOR,	No. 85-7042
	JUDGMENT
Respondent.	

This Cause came on to be heard on the Transcript of the Record from the U.S. Department of Labor and Petitioner's Motion for Summary Reversal and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the decision of the said U.S. Department of Labor in this cause be, and hereby is REVERSED.

Filed and entered: May 20, 1985.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEASTERN ARIZONA GOVERNMENTS ORGANIZATION,	Nos. 85-7042
Petitioner,	
vs.	
U.S. DEPARTMENT OF LABOR,	ORDER
Respondent.	

FILED: AUG. 28, 1985

BEFORE: KENNEDY, ALARCON, AND FERGUSON, Circuit Judges

Respondent's motion for leave to file an oversized petition for rehearing is granted. The petition shall be filed as received.

Respondent's petition for rehearing is denied.